



In the Matter of:

DANIEL S. SOMERSON,

ARB CASE NO. 04-046

COMPLAINANT,

ALJ CASE NO. 2004-STA-12

v.

DATE: May 28, 2004

EAGLE EXPRESS LINES INCORPORATED,

RESPONDENT,

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

ORDER DISMISSING PETITION FOR REVIEW

BACKGROUND

The Complainant, Daniel Somerson, has filed a complaint under the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997). On January 15, 2004, the Complainant filed with the ARB a petition for review requesting the

ARB [to] order the administrative equivalent of a writ of mandamus to the Front Office of the DOL OALJ to:

- A. Remedy its inexplicable, invidiously discriminatory refusal to either assign a judge or hold a hearing on Mr. Somerson's timely November 29, 2003 request for hearing in this case; and
- B. Cease and desist violating the First Amendment rights of Mr. Somerson and his counsel.

Mr. Somerson's Petition for Writ of Mandamus and his Petition for Review of DOL OALJ Refusal to Hold Surface Transportation Act (STA) Whistleblower Hearing and Violation of First Amendment Rights of Complainant and Counsel at 1.

On February 10, 2004, the ARB issued an Order to Show Cause requesting the Complainant to show why the petition should not be dismissed for lack of jurisdiction. In his response to the Show Cause Order, he argues that where "an agency has an obligation to carry out a mandatory, nondiscretionary duty and either fails to meet an established statutory deadline for carrying out that duty or unreasonably delays in carrying out the action, the failure to carry out that duty is itself final agency action. *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), *cert. granted*, 124 S.Ct. 462 (2003)." The Complainant, then, appears to contend that because the STAA provides that "[a] hearing shall be conducted expeditiously," 49 U.S.C.A § 31105(b)(2)(C), and the STAA and its regulations provide timeframes for various steps in the adjudicative procedure, the Office of Administrative Law Judges (OALJ) violated a mandatory duty when it had not scheduled the hearing by the time Somerson filed this petition with the Board. Somerson also argues that the OALJ has "violated the First Amendment by delaying this case and refusing to assign a judge." Response to Show Cause Order at 13.

DISCUSSION

As was noted in the Order to Show Cause, the Secretary of Labor has delegated to the ARB the authority to review ALJs' decisions under the STAA. Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). The clear purpose of the order issued by the Board was for the Complainant to show how, in the absence of a decision by an ALJ, the Board has jurisdiction over this matter at this stage of the proceedings. The Secretary's Order does not specifically delegate mandamus jurisdiction to the Board. Nor has Somerson identified any statutory or regulatory authority or case precedent establishing the Board's jurisdiction. Somerson argues that jurisdiction arises because the OALJ violated the alleged statutorily mandated deadline. In so arguing, however, Somerson confuses the requirements for establishing an entitlement to mandamus with the basis for asserting this Board's jurisdiction to consider a petition for mandamus in the first instance.¹

Furthermore, Somerson's argument that the OALJ violated a mandatory deadline is clearly belied by the STAA's regulations establishing timeframes for various steps in the adjudicative procedure. The regulation states that, "[t]he time requirements imposed on the Secretary by these regulations are directory in nature." 29 C.F.R. § 1978.114. *See also Brock v. Roadway Express, Inc.*, 481 U.S. 252, 268 (1987) ("The Secretary interprets these time requirements not as mandatory but rather as 'directory in nature.'").

¹ As the United States Court of Appeals for the District of Columbia has held, "the remedy of mandamus is reserved for extraordinary circumstances in which the petitioner demonstrates that his right to issuance of the writ is clear and indisputable and that no other adequate means to obtain relief exist." *Byrd v. Reno*, 180 F. 3d 298, 302 (1999).

Consequently, Somerson has failed to show cause as to why, in the absence of a decision by an ALJ, the Board has jurisdiction over this matter, and we must **DENY** the motion to issue a Writ of Mandamus to compel the OALJ to schedule a hearing.²

Somerson also asks this Board to issue a Writ of Mandamus to compel the OALJ to cease and desist from violating his, and his counsel's, First Amendment rights. Somerson has, again, failed to show cause as to how and where the ARB derives the authority to issue such a writ in the absence of a decision by an ALJ. Consequently, this motion is **DENIED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

² The ARB declines, at this time, to decide the issue of whether the Board has the authority to issue a Writ of Mandamus. Instead, the motion is rejected for a failure to show cause.